No. 14512

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

FRED W. STEINER, JOHN W. HADZIMA, ROY PURSSELLEY, NICHOLAS SPICUZZA, OLIVE SPICUZZA, GEORGE TODD, and CHARLES WALKER,

Appellants.

BRIEF OF APPELLEE.

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TABLE OF AUTHORITIES CITED

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BRIEF OF APPELLEE.

(Reference to "Appellants" refers to all appellants.)

(Reference to "Appellants' Opening Brief" refers to that brief filed on behalf of those appellants represented by Clifford L. Duke, Jr.)

I.
STATEMENT OF THE CASE.

On August 5, 1953, an eleven count indictment was returned against the seven appellants herein and four others, charging all defendants with a conspiracy to smuggle psittacine birds into the United States [18 U. S. C. 371—Count One; Tr. pp. 3-14], with the illegal importation of psittacine birds [18 U. S. C. 545—Counts Two,

Four, Six, Eight and Ten; Tr. pp. 14-20], and with the receiving, concealing, and transportation of illegally imported merchandise [18 U. S. C. 545—Counts Three, Five, Seven, Nine and Eleven; Tr. pp. 14-20].

The conspiracy count charged a conspiracy beginning on December 10, 1949, and continuing to the return of the indictment. Thirty-five overt acts were set forth in this count. [Tr. pp. 6-44.]

The dates of the substantive counts were as follows:

Counts Two and Three—December 3, 1951

Counts Four and Five—January 26, 1952

Counts Six and Seven—March 10, 1952

Counts Eight and Nine—April 3, 1952

Counts Ten and Eleven—September 22, 1952.

The trial of the appellants and two others (two defendants were fugitives) commenced on September 29, 1953. [Tr. p. 119.]

The Government rested its case on October 14, 1953, and the defense started to put on their case. On October 15, 1953, the defense reminded the Court that the motion for judgment of acquittal on the substantive counts was still pending. This motion had evidently been made at the close of the Government's case on the ground of insufficient evidence. [Tr. p. 35.] In the alternate, counsel Duke, representing all defendants but appellant STEINER, moved to compel the Government to elect offenses on which it chose to rely to support the substantive counts of the indictment. The Court dismissed substantive Counts Two through Seven inclusive prior to the submission of the case to the jury. [Tr. p. 35.]

On October 21, 1953, the jury returned a guilty verdict as to appellants as follows:

STEINER—Counts One, Eight, Nine, Ten and Eleven

SPICUZZA—Counts One, Eight, Nine, Ten, and Eleven

OLIVE SPICUZZA—Counts One, Eight and Nine (Counts Ten and Eleven, Not Guilty)

HADZIMA—Counts One, Eight, Nine, Ten and Eleven

WALKER—Counts One, Ten and Eleven (not guilty —Eight and Nine)

TODD—Counts One, Eight, Nine, Ten, Eleven

PURSSELLEY—Count One (Not Guilty, Eight, Nine, Ten, Eleven). [Tr. pp. 64-75.]

On October 21, 1953, appellants made a motion for a new trial. Affidavits were filed. Testimony was taken. [Tr. pp. 698-746.] On November 10, 1953, the motion for new trial was denied and a written opinion filed by the Court. [Tr. pp. 34-64.] On November 10, 1953, the Court imposed sentence. On November 16, 1953, the appellants filed their Notice of Appeal. [Tr. pp. 76-78.]

II.
JURISDICTION.

Appellee refers to the foregoing Statement of Facts, *supra*. Appellee refers to the authorities referred to in Appellants' Opening Brief, p. 3, and Appellant HADZIMA's Opening Brief, pp. 3 and 4.

III.
ISSUES.

Appellee does not admit that all issues were properly raised in the trial court. Where appellee has an objection on this basis it will be discussed in detail in the succeeding argument.

A. Does the Tariff Act of 1930 (19 U. S. C. 1001, *et seq.*) and the basic customs penal provision (18 U. S. C. 545) include psittacine birds within their scope? Within this general question the following specific issues arise:

   1. The effect of the Surgeon General's quarantine regulations (42 C. F. R. 72.152(b)) on customs laws.
   2. The scope of the term "merchandise" as used in 18 U. S. C. 545.
   3. The effect of the bird and animal sections of Title 18 U. S. C. (Secs. 42 and 43) on customs laws.

B. Do each of the substantive counts of the indictment fail to charge an offense in that it is not charged what law or laws the importation is contrary to?

C. Was error committed by the trial court in refusing to compel the Government to elect the substantive offense, upon which it had offered evidence, on which it relied, to prove the specific charges in the substantive counts of the indictment?

D. Did the trial court abuse its discretion in denying appellants' motion for new trial on the grounds that a person, who was under subpoena as a witness, discussed the case with one of the jurors during the trial?

IV.
ARGUMENT.

A. Each Count of the Indictment Charges Either a Violation of 18 U. S. C. 545 (Illegal Importation of Merchandise, Receiving Illegally Imported Merchandise) or a Conspiracy to Violate 18 U. S. C. 545.

Appellants contend that certain regulations and certain other statutes which pertain to either psittacine birds or birds and animals limit the scope of the basic customs penal law so far as the latter pertains to psittacine birds. These regulations and laws will be discussed in turn.

1. The Quarantine Regulation (42 C. F. R. 71.152(b)) Promulgated by the Surgeon General Pursuant to 42 U. S. C. 264-271.

Section 545, Title 18, U. S. C. is the basic customs penal provision concerning the smuggling and illegal importation of all merchandise into the United States.

Prior to 1948 the provisions of this section were contained in Title 19 U. S. C. Section 1593. As such, it was part of the Tariff Act of 1930 (Title 19, U. S. C., Chap. 4 (Secs. 1001, *et seq.*)). The provisions of the Tariff Act come down from a history of Tariff Acts stemming from the beginning of our Republic.

Section 1461 provides that "all merchandise and baggage imported or brought in from any contiguous country . . ." (exceptions provided) "shall be unladen in the presence of and be inspected by a Customs officer at the first port of entry at which the same shall arrive . . ." Sections 1481 and 1482 set forth the requirements

of "invoices" for merchandise to be imported into the United States. Section 1484 provides, with exceptions, that a consignee of imported merchandise, defined in Section 1483, shall make "entry" therefor. It further provides, "No merchandise shall be admitted to entry under the provision of this section without the production of a certified invoice. . . ." Section 1485 provides "(a) Every consignee making entry under the provisions of Section 1484 of this title shall make and file therewith, in a form to be prescribed by the Secretary of the Treasury, a declaration under oath stating. . . ."

The foregoing sets forth the customs law as it pertains to the special provision for inspection of merchandise imported from contiguous countries; and the basic customs law requiring an "entry", "invoice" and "declaration" for all merchandise brought into the United States.

The Surgeon General of the United States has promulgated certain regulations, 42 C. F. R. 71.152(b), pursuant to 42 U. S. C. 264-271. Section 264 authorizes the Surgeon General, with the approval of the administrator (referring to the Federal Security Administrator) "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions. . . ." Section 271 provides that, "Any person who violates any regulations prescribed under Section 264-266 of this title . . . shall be punished by a fine of not more than $1,000.00 or imprisonment for not more than one year or both."

The pertinent regulations are set forth in Chapter I of 42 C. F. R. under the heading, Public Health Service.

(1955 Cumulative Pocket Supplement to 1949 Edition.) Subchapter F is entitled, "Quarantine, Inspection, Licensing." The first part of subchapter F is entitled "Foreign Quarantine." In sub part J, importation of certain things, such as cats, dogs, monkeys, dead bodies, lather brushes, and psittacine birds are dealt with. It is within this last category that Section 71.152(b) is set forth. This section provides as follows: "Psittacine birds shall not be brought into the United States for the purpose of sale or trade. Psittacine birds may be brought in only for the purposes and under the conditions prescribed. . . ." The regulations then provide that psittacine birds may be brought in, under certain specified conditions, for medical research, zoos, pets, and also if taken out of the United States may be admitted for return.

It would seem clear that Congress, in delegating to the Surgeon General certain powers to promulgate regulations in connection with the public health, including quarantine, inspection and licensing, did not intend to amend or repeal, in part, the Tariff Act of 1930 or to allow the Surgeon General by so promulgating such regulations to so amend or repeal it.

In *Murray v. United States* (9th Cir.), 217 F. 2d 583, November 23, 1954, opinion by Justice Fee, this very question was decided. The defendant was indicted for a conspiracy to violate 18 U. S. C. 545, and for perjury. (18 U. S. C. 1621.) He entered a plea of guilty to these counts and was sentenced. Thereafter the defendant filed motions for correction of sentence under 28 U. S. C. A. 2255, which were denied. Defendant appealed from the denial of these motions. One of the points raised on appeal was the very point now raised by appellants. The denial of the motion was affirmed. This Court in its opinion

stated that the imposition of a quarantine, as is imposed by the regulations, 42 C. F. R. 71.152(b), has no relation to the importation of goods contrary to law. The opinion continued:

> "It is doubted that a mere police rule so motivated could dominate the field to the exclusion of express criminal statutes. In any event, no penalty is provided for importation specifically, and the authority is in an omnibus section of a general act which fixes penalties for violation of such regulations in general terms."

The opinion concluded that no matter when the statute authorizing the promulgation of the regulation was adopted (it was adopted in 1944),

> "It would not in any event have repealed the provisions of the statute directed against smuggling, which was passed in its present form in 1948 and fixes a definite penalty for such acts. The latter supersedes all prior statutes and overrules regulations no matter when adopted. *Callahan v. United States,* 285 U. S. 515, 52 S. Ct. 454, 76 L. Ed. 914."

It is submitted that the *Murray* case completely answers the contentions of appellants on this issue.

2. Psittacine Birds Are Merchandise.

Merchandise is defined in the Tariff Act of 1930 (19 U. S. C. 1401(c)) as follows:

> "(c) Merchandise. The word, 'merchandise,' means goods, wares, and chattels of every description and includes merchandise, the importation of which is prohibited."

Live birds are subject to duty as set forth in par. 711, Section 1001, Title 19, U. S. C.

In *United States v. Kushner* (2d Cir.), 135 F. 2d 668, the defendant was convicted of five substantive counts of importing and assisting the importation of undeclared gold bullion from Canada and of six counts which charged a conspiracy to commit these offenses. The offenses were charged under Title 19 U. S. C. Secs. 1593(a) and (b) and Sec. 483(b), which sections were the predecessors to 18 U. S. C. 545. The appeal challenged, among other things, the illegality in any event of the importation of the undeclared gold bullion. Appellant maintained that gold being duty free (19 U. S. C. 1201, par. 1638), its importation did not violate the Customs Act; and that in any event the exclusive penalty for any unlawful dealing with gold, including importation, was under the Gold Reserve Act, 31 U. S. C. 443, which Act provided penalties for the acquisition and use of gold in violation of law.

The Court said:

> "It seems clear, however, that the statutes, 19 U. S. C. A. Secs. 1461, 1484, which require the inspection and invoicing of all 'merchandise' brought into the country include duty-free gold bullion. . . . Merchandise (as) defined by 19 U. S. C. A. Sec. 1401(c) . . . is broad enough to include gold." (135 F. 2d 670.)

The defendant contended that inasmuch as 31 U. S. C. 446 provided that all laws inconsistent with the Gold Reserve Act were repealed, that 31 U. S. C., Sec. 443 was exclusive. The Court pointed out that Sec. 443 applied only to importation in disregard of regulations or licenses of the Secretary of the Treasury issued pursuant to Sec. 441.2, with a view to stabilizing the domestic

monetary economy. These sections were not inconsistent with Secs. 1593(a), 1593(b) and 483(b), as here directed at the impairment of the efficiency of customs administration by a failure to declare or invoice any imported gold. The Court said:

> "Each statute stands for a separate function. . . . Furthermore, Sec. 443 is much more limited in scope than the penal provisions of the Customs Act. Repeals by implication are not favored; and where as here, there are reasonable grounds for the continued effectiveness of both statutes, a repeal will not be presumed. . . ." (135 F. 2d 671.)

Palmero v. United States, 112 F. 2d 922 (cited by Appellants (App. Op. Br., pp. 8, 12; App. Hadzima's Op. Br., p. 9)) was distinguished in that in the latter case the Court condemned an attempt to punish twice the same violation under both the Narcotic Drug Import and Export Act (21 U. S. C. 173, 174) and under the Customs Act. The Court quoted from a decision by Judge Augustus Hand in *United States v. Twenty-Five Pictures* (S.D.N.Y.), 260 Fed. 851:

> " 'The collation of information in order to pass upon the classification of merchandise, and the question often most difficult as to whether it is dutiable, and, if so, just what duty is imposed, is an important function of the revenue department of the government. Without such information, the Customs Act cannot really be enforced or the revenues collected.' " (135 F. 2d 671.)

Essentially, the contention that psittacine birds are not merchandise is the same contention as discussed in the prior section. As such it is completely answered by the opinion of Justice Fee in the *Murray* case, *supra.*

3. The Animal, Birds and Fish Sections of Title 18 United States Code (Sections 42 and 43).

Appellant Hadzima raises the additional question of whether Secs. 42 and 43 of Title 18 remove psittacine birds from the operation of the basic customs penal provision, 18 U. S. C. 545. (App. Hadzima's Op. Br., pp. 9-11.) Section 42(a) prohibits the importation of certain animal and birds which are injurious to the interests of agriculture or horticulture. The statute lists such animals and birds and authorizes the Secretary of Interior to add other such birds and animals to the list. The statute then excludes certain cage birds, including domesticated parrots in the following language:

> "Nothing in this subsection shall restrict the importation of natural history specimens for museums or scientific collections, or of certain cage birds, such as domesticated canaries, parrots, or such other birds as the Secretary of Interior may designate."

The plain meaning of this language is that parrots (psittacine birds) cannot be prohibited from being imported under 18 U. S. C. 42 and, thus, by the terms of the statute itself, parrots are excluded from its operation.

Section 42(c) and Section 43 deal with "wild animals and birds." Section 42(c) authorizes the Secretary of the Treasury to prescribe requirements and to issue permits for the transportation of "wild animals and birds." Section 43 deals with "wild animals and birds," unborn, alive or dead. Compare this to Section 42 which refers to parrots as "domesticated" "cage birds". There is nothing in the record which would include psittacine birds within the meaning of "wild animals and birds" and no such contention has been made previously.

The government respectfully submits that Sections 42 and 43 of Title 18 U. S. C. in no way alter or amend 18 U. S. C. 545 as the latter section applies to psittacine birds.

Appellant Hadzima makes the further contention that appellants did not have to make entry or declare the merchandise, *i. e.,* the birds, under the customs laws because to do so would have required them to incriminate themselves, presumably contrary to the Fifth Amendment of the Constitution. (App. Hadzima's Op. Br., p. 11.)

In *United States v. Dalton,* 286 Fed. 756, this contention was made. The charge was brought under Section 1593 of Title 19 U. S. C. (the predecessor to the present 18 U. S. C. 545). The Court said:

> "It is obvious that the purpose was to smuggle and import into the United States the liquor to defraud the United States of the revenue, and while a permit is a prerequisite to entitle liquor to be entered, the fraudulent act in not obtaining a permit does not ripen the act into a right, and grant immunity from prosecution because the declaration would be incriminating. . . .
>
> "It was incumbent upon the defendants, not only to declare the entry, but also to obtain a permit qualifying the goods for entry, and for having failed may not hide behind the Fifth Amendment when apprehended and evade penalty of the illegal act, and make a right out of two wrongs. The Fifth Amendment has no application where parties or goods seek admission into the United States."

B. The Substantive Counts of the Indictment Charge the Importation of Merchandise "Contrary to Law." Such Counts State an Offense.

Appellants have not properly raised this issue. At no time during the trial was the issue raised that any substantive count was insufficient for the reason that it did not charge what law the importation was contrary to or did not sufficiently advise the appellants of the crime of which they were charged so that the appellants could properly defend themselves at the time of trial. Appellants do not and cannot refer to any page of the transcript where this point was raised. (App. Op. Br., p. 4; App. Hadzima's Op. Br., p. 5.)

Deaver v. United States (Dist. Col.), 155 F. 2d 740, 743 (footnote 3);

Richardson v. United States (10th Cir.), 199 F. 2d 333, 335.

The point was not raised in the "Statement of Points Upon Which Appellants Rely." [Tr., pp. 748, 749.]

Rules of Court of Appeals, 9th Cir., Rule 17(6).

Under the present rules of pleading it is required that an indictment be a plain, concise, and definite written statement of the essential facts constituting the offense charged. An indictment in the language of the statute is sufficient unless the statute includes by implication an essential element which is not alleged in the indictment.

Rule 7(c), Federal Rules of Criminal Procedure;

Lynch v. United States (5th Cir.), 189 F. 2d 476, 479 (decision by Judges Holmes who wrote the opinion in the *Babb* case, *infra*);

United States v. Franklin (7th Cir.), 188 F. 2d 182, 186;

Todorow v. United States (9th Cir.), 173 F. 2d 439, 447.

Compare the foregoing with the language of Justice Field in the case of *United States v. Hess,* 124 U. S. 483, where it is stated:

> "Undoubtedly, the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

Modern pleading no longer requires such particulars. As stated in *Donnelly v. United States* (10th Cir.), 185 F. 2d 559, the specificity formerly held necessary to charge an offense is no longer required or sanctioned.

Form 5 of the Appendix of Forms of the Federal Rules of Criminal Procedure is a form indictment for violation of 26 U. S. C. 2833 (present Sec. 26, U. S. C. 5606(a)). The charge that ". . . John Doe carried on the business of a distiller without having given the bond as required by law" sufficiently charges the foregoing offense according to the approved form. See also *United States v. Perl* (2d Cir.), 210 F. 2d 457, 458.

Appellants rely on the case of *Babb v. United States* (5th Cir.), 218 F. 2d 538. In that case defendant was charged with receiving merchandise imported contrary to law, to-wit, cattle. A motion to dismiss was made by defendant on the grounds that the indictment did not advise them of what law the merchandise was im-

ported contrary to. A Bill of Particulars was filed setting forth statutes and regulations.

The Court held that the statute omitted an essential element of the indictment. It further held that this was not cured by the Bill of Particulars and cited *Keck v. United States,* 172 U. S. 434, as controlling. It is submitted that this result is neither required nor necessary under the *Keck* case.

The Court in the *Babb* case stated that it was significant that government did not allege in the Bill of Particulars that the cattle were smuggled, in violation of the first paragraph of Section 545. May we inquire, rhetorically, if such an allegation would have cured the indictment.

The Court in *Babb v. United States, supra,* relied on *Keck v. United States,* 172 U. S. 434, 19 S. Ct. 254, as do appellants in the instant case. It is submitted that the *Keck* case can be distinguished. In the *Keck* case the defendants were charged with bringing diamonds into the United States "contrary to law." A motion to quash and a demurrer to the indictment were overruled by the trial court. The United States Supreme Court said that the indictment should be tested by the standards set forth in certain cases including *United States v. Hess,* 124 U. S. 483, cited previously. The Court concluded that the count was clearly insufficient.

The facts of the *Keck* case show that a captain of a vessel was given a package to be delivered in the United States at the instance of the defendant, the contents of which were unknown to the captain. The package, in fact, contained diamonds which diamonds were not on the manifest list of the vessel. A treasury agent came aboard

the vessel at her arrival in port and upon demand the captain handed over the package which contained the diamonds.

The Court ruled that the diamonds had not been smuggled inasmuch as the time for the "entry", *i. e.,* invoicing and declaration, of the diamonds had not arrived; thus the government was relying on something other than the general requirements of entering, invoicing and declaring (19 U. S. C. 1484, 1485) to show the importation contrary to law. Inasmuch as the diamonds were not listed on a manifest of the vessel they would have been imported contrary to law (bottom of p. 442), but it would be some other customs law than the general provisions noted above. In this respect the defendant was not notified of the specific statute to which the importation was contrary. In the instant case, there is nothing in the record to show that the time for "entry" had not arrived. The presumptions to support the verdict would apply—that the merchandise was brought in contrary to the general requirements of the customs laws above noted.

In the *Keck* case, as previously stated, a motion to dismiss and a demurrer was overruled by the trial court. The question, having been properly raised by defendant, could be considered on appeal. In the instant case, no objection was made on this ground before the trial court. No request for a bill of particulars was made. While we do not admit the substantive counts are defective in any respect, if a defect in form it be, then it would have been cured by the verdict.

Deaver v. United States (Dist. Col.), 155 F. 2d 740;

Miller v. United States, 300 Fed. 529;

United States v. Beck, 118 F. 2d 178;

United States v. Williams (5th Cir.), 202 F. 2d 712 (this very pertinent decision is also by Judge Holmes);

United States v. Daily, 139 F. 2d 7.

The *Keck* case has also been validly distinguished in the past where it applies to items which cannot be imported.

Miller v. United States (6th Cir.), 300 Fed. 529, 533 (liquor);

Wong Lung Sing v. United States (9th Cir.), 3 F. 2d 780 (narcotics) ;

Babb v. United States, supra, 218 F. 2d 538, 541.

Yet opium can be imported into the United States for certain purposes and under certain conditions (21 U. S. C. 173); similarly, psittacine birds (42 C. F. R. 71.152(b)).

We quote from an opinion by Judge Weinberger in *United States v. Walker,* No. 24499 (D. C., S. D., Calif., May 27, 1955), in which the defendant moved to correct an illegal sentence, on the grounds here presented, under Section 2255, Title 28 U. S. C.:

> "In the case at bar, the 'merchandise' was described, and consisted of psittacine birds; the fact that these birds transmit parrot fever to human beings is so widely known as to well nigh constitute the birds international outlaws; their importation is lawful only under 'exceptional circumstances.' It cannot be said that their importation is 'presumptively lawful.' "

The innerquoted language refers to language used in *Miller v. United States, supra.* Thus, psittacine birds would fall within the *Miller* and *Sing* cases, *supra.*

It is respectfully submitted that the indictment sufficiently advises appellants of the nature of the offense. It includes all the essential elements of the offense. It would bar a second prosecution for the same offense. Repeatedly before and during the trial, the question of the quarantine regulations and the provisions of the Customs law were discussed. Thus, appellants were well aware of the charges on which they were tried and convicted. There is nothing in the record to show that the jury was not fully instructed on the meaning of the words, "contrary to law." It is submitted that the substantive counts of the indictment cannot at this late date be challenged on this ground.

C. The Trial Court Did Not Err in Refusing to Compel the Prosecution to Elect Which Evidence It Might Designate to Prove the Substantive Counts of the Indictment.

On October 14, 1953, during the course of the trial defendants made a motion to strike all evidence pertaining to Counts 2-11, *i. e.,* the substantive counts. [Tr. pp. 671-678; p. 35.] This motion was presumably made at the close of the government's case and was in effect a motion for judgment of acquittal on those counts. The matter of the procedure relating to the argument on this motion was first taken up in chambers the previous night. [Tr. p. 674.] On October 14 counsel presented their arguments, accordingly. [Tr. pp. 671-678, 682-688.] No mention was made of the motion to compel the government to elect at this time. On October 15, Mr. Duke,

counsel for all defendants, but appellant Steiner, during the trial of the case, made the motion which is the basis for this point as follows:

> "May the record show that our Motion to Dismiss the substantive counts is still pending and in the alternative I will make a sole motion at this time to compel the government to elect, if any, offenses they choose to rely as far as the substantive counts are concerned." [Tr. p. 688; p. 35.]

At some time prior to the submission of the case to the jury pursuant to the motion of defendants made at the conclusion of the government's case, the Court granted motion for judgment of acquittal on counts 2 through 7, inclusive. [Tr. p. 35.] On October 20, 1953, before submission of the case to the jury defendants made a Motion for Judgment of Acquittal on all remaining counts. [Tr. pp. 693, 694.] No mention was made at this time of the motion to compel an election.

Trial Court stated in its opinion: "I interpreted this brief statement" (referring to the above quoted motion to compel an election), "as referring to defendants' prior motion for dismissal of the substantive counts on the ground of insufficient evidence." The Court then pointed out that pursuant to the motion for judgment of acquittal, it did dismiss six of the substantive counts. This left the remaining substantive counts, as covered by two dates: April 3, 1952 and September 22, 1952. [Tr. p. 35.]

Evidently, defense counsel did not make himself understood to the Court at the time the motion was made. At

least the Court did not at that time understand that a motion for election, as presently urged, was made by defendants. It is submitted that the trial court was justified in its interpretation of the motion under the circumstances.

If it is required that a motion be made first in the trial court before it can be considered on appeal, it is a corollary proposition that it must be made understandably. To mention it once in passing in the middle of the trial and not to mention it again until the motion for new trial would not be in accord with the letter or the spirit of the procedural law in this regard.

The failure to reassert the motion before the submission of the case to the jury would result in a waiver.

Finnegan v. United States, 204 F. 2d 105, 109 (motion to elect);

Ansley v. United States, 135 F. 2d 207 (motion for judgment of acquittal).

By granting the motion for judgment of acquittal as to counts two through seven, inclusive, the trial court in effect limited the jury's consideration to but two dates. The fact that the jury was selective and acquitted certain of the defendants as to certain of the substantive counts further shows that the jury was not confused as to the evidence submitted.

It is the position of the government that in any event the court did not err in refusing to compel the government to designate which specific evidence should be considered as supporting a certain substantive count. For instance, if evidence was introduced which showed that smuggling in fact had occurred on two dates, April 1 and April 5, and the indictment charged the offense as

taking place on or about April 3, there is no reason why the evidence of smuggling on both dates could not be properly submitted to the jury. Certainly, the jury must agree unaminously on which date it finds the smuggling to have taken place. This can be assured by a request for a special verdict. (See *United States v. Kawakita* (D. C., S. D., Cal.), 96 Fed. Supp. 824, 851-2, in which the use of special verdicts was referred to approvingly by the Supreme Court in *Kawakita v. United States,* 343 U. S. 717, 737.) No request for a special verdict was made in the instant case.

It is also respectfully called to the attention of the court that the motion to compel an election as originally made pertained only to the substantive counts. [Tr. p. 688.] In Appellants' Opening Brief it is now contended that the motion referred to "all of the counts of the indictment" (p. 13) (*Cf.,* Specification of errors, p. 6 App. Op. Br.; similarly, App. Hadzima's Op. Br., p. 14).

Appellants have stated that "a large amount of testimony" shows the "large number of offenses" on which the government introduced testimony. (App. Op. Br., p. 13; App. Hadzima's Op. Br., p. 14.) Appellants have not referred to the page or pages of the Transcript on Appeal where these large number of offenses are set forth. This is contrary to Rule 18D of the Rules of the United States Court of Appeals for the 9th Circuit.

Gordon v. United States, 202 F. 2d 596;

Lii v. United States, 198 F. 2d 109.

It is submitted that under the circumstances the motion for election was not properly raised; further that it was waived by a failure to reassert the motion at the con-

clusion of the case. The issue is not properly presented by failure to reference to the Transcript. In any event the granting of the motion was within the discretion of the trial court. A failure to grant the motion was not an abuse of discretion.

D. The Trial Court Did Not Abuse Its Discretion in Denying Appellants' Motion for New Trial Which Motion Was Based on the Fact That a Person, Who Was Under Subpoena as a Witness, Discussed the Case With One of the Jurors During the Trial.

If the trial court had any discretion at all in a situation of this kind it is respectfully submitted that such discretion was properly exercised in the instant case.

The matter could not be better presented than did Judge Solomon, the trial court judge, in his opinion denying the motion for new trial. [Tr. pp. 38-64.] We would feel presumptive to re-present the factual matters discussed by Judge Solomon. The extremely strange happenings which occurred during the course of the trial impressed Judge Solomon considerably as is indicated by his opinion. His relation of the various occurrences gives an immediateness to these events—a closeness to the actual trial—which is not often found in transcripts on appeal. We will submit the matter on the facts as so thoroughly considered and stated.

In *Ryan v. United States,* 191 F. 2d 779, the defendants moved for a new trial because of conversations of the prosecuting attorney with several members of the jury during recesses in the trial. After an extensive hearing the trial court found that the defendants were not prejudiced in the slightest degree by the conduct of the district

attorney. In affirming the decision of the trial court, the Court of Appeals stated that a presumption of prejudice did arise from the fact that the conversations had taken place. However, such presumption was rebuttable. It was proper procedure to have a full hearing as to whether the jurors were in fact prejudiced. The Court distinguished *Stone v. United States,* 113 F. 2d 70, cited by appellants, in that the latter case involved an overture to a juror in the nature of bribery. The exercise of discretion by the trial court was proper.

In *Klose v. United States,* 49 F. 2d 177, which case is discussed in the opinion of Judge Solomon [Tr. pp. 60-62], the Court stated:

> "It is not claimed that the misconduct was the result of any corrupt or improper influence practiced on the part of the government, nor that anyone connected with the trial of the case was in any degree responsible for the unfortunate incident or guilty of any reprehensible conduct with reference thereto. . . . It is the duty of the trial judge to maintain the integrity of trials by jury, and if it appears at any stage of the trial before verdict that misconduct of any juror or other person has tainted the panel with any sort of corruption or intimidation or coercion, the trial should be stopped and a mistrial granted. . . . Yet it does not follow that a mistrial should be granted whenever any evilly disposed person in no way connected with the parties, attempts to make improper remarks or advances to a juror or attempts to corrupt a juror." 49 F. 2d 181.

The Court of Appeals concluded that there was no abuse of discretion by the trial court denying a mistrial, and

no prejudice was shown by reason of the alleged misconduct and irregularity.

With the exception of *Stone v. United States, supra,* in no case cited by appellants was an exercise of discretion by the trial court reversed where competent evidence of the alleged misconduct was heard and the trial court did in fact exercise its discretion in the matter.

In the *Klose* case the court stated as follows: "Whether this juror had been guilty of misconduct, or had been subjected to improper influence affecting his verdict, was a fact to be determined by the trial judge." 49 F. 2d 181. In the instant case the court succinctly summarized the facts which it found to exist:

> "The evidence of guilt is clear and convincing;
>
> "The defendants, even before the trial commenced, had planned to obtain a mistrial:
>
> "The action of at least one defendant indicated an attempt to obtain a mistrial—at least for himself.
>
> "The defendants discounted the possible effect of a conversation between a juror and a relative of a defendant, which was disclosed by the juror during the trial;
>
> "The defendants objected to measures proposed by the court to determine whether there was jury tampering so that steps could be taken to prevent it while two alternate jurors were available;
>
> "The interest and sympathies of the person who talked with the second juror were with the defendants;
>
> "The conversations between the second juror and such person were casual and referred to matters that

had already been admitted in evidence or which were favorable to the defendants;

"All the evidence concerning jury tampering which was within the power of the Government to produce was produced, but evidence which the defendants were in a position to disclose was suppressed.

"In view of the evidence and all of the facts and circumstances surrounding the alleged jury tampering, I am convinced that no prejudice did or could have resulted to the defendants or any of them, and I further find that it would be a miscarriage of justice to set aside the verdicts of the jury." [Tr. p. 63.]

It is respectfully submitted that the question of bias and prejudice was susceptible of an intelligent judgment by the trial judge on the evidence adduced upon the hearing of the motion. Thus, the trial court properly exercised its discretion in refusing to grant a new trial.

IV.
Conclusion.

The Court imposed concurrent sentences only on Counts 8, 9, 10 and 11, that is, sentences concurrent with the sentence imposed on Count 1. [Tr. pp. 30-33, 64-75.] Therefore, unless the trial court erred with respect to the conspiracy count (Count 1), the judgment of the trial court would not be changed. *Barnes v. United States,* 197 F. 2d 271. The issues raised as to the sufficiency of the substantive counts (Sec. B, *supra*) and as to the motion to compel an election (Sec. C, *supra*) do not refer to the conspiracy count.

It is submitted that all counts of the indictment charge either a violation of or conspiracy to violate the basic customs penal provision, 18 U. S. C. 545.

It is submitted that the substantive counts of the indictment charge an offense against the laws of the United States.

It is submitted that the trial court properly exercised its discretion in refusing to grant a new trial.

It is respectfully submitted that the convictions of appellants in all respects should be affirmed.

Respectfully submitted,

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